

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Brent Tweed, et al

v.

The Town of Nottingham, et al

Docket No. 218-2019-CV-00398

PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTION TO ATTORNEY'S FEES

NOW COME the plaintiffs, Brent Tweed and G&G Goods, Inc., by and through counsel and respectfully states as follows:

1. The Town's objection makes three basic arguments each of which should be rejected: (1) the Town did not engage in active litigation against the plaintiffs; (2) the amount of work that went into the litigation was excessive; and (3) Nottingham Water Association ("NWA") is responsible for the fees and the Town is not. All of these arguments should be rejected.

I. The Town's Claim That It Was Passive Litigant Is Irrelevant To The Question Of Responsibility Under The Substantial Public Benefit Theory.

2. First, the Town argues that it is not responsible for the expenditure of fees, arguing that since it did not object to the plaintiffs' request for a temporary injunction, ¶3, did not object to the substance of the plaintiffs' motion for summary judgment, ¶4, did not participate in NWA's appeal to the New Hampshire Supreme Court, ¶5, and did not "prolong this action," ¶6 a substantial portion of plaintiffs' attorney's fees should not be assessed against it.

3. This argument misapprehends the basis for the Court’s award of fees. While this argument might be relevant to a claim that the Town acted in bad faith during the litigation, the Court has already stated that bad faith litigation is not the basis for its award of fees.

4. The facts asserted by the Town are not relevant in the context of the Court’s award of fees under the substantial public benefit theory. As the Court noted in its Order on attorney’s fees (dated June 4, 2021), “[t]he purpose of the fee award is not to penalize the municipality but to compensate the plaintiffs for their efforts on behalf of the public.” Order at 4.

5. The Court correctly found that, “[t]he threat of private, extrajudicial enforcement of the ordinance, under color of law, constituted a real threat to Town residents.” Order at 4.

6. The substantial public benefit conferred by the plaintiffs’ efforts is the removal of the threat of private enforcement against members of the public, by members of the public¹. The fact that any citizen was effectively “deputized” to enforce the Ordinance required the plaintiffs to obtain a Court order declaring the Ordinance unconstitutional.

7. The intervention by NWA, or other potential intervenors, was fully predictable, and overcoming legal positions advanced by NWA as *amicus* was necessary in order for the plaintiffs’ efforts to lead to the public benefit.

8. Thus, regardless of the Town’s efforts (or lack of efforts) to actively defend the Ordinance on its merits, all of the work that was performed by plaintiffs’ counsel was necessary.

9. Further, the Town was not as passive as its objection suggests. At the outset of the case, the Town did agree that it would not enforce its Ordinance. Shortly thereafter, the Town

¹ In this way, the Nottingham ordinance followed a similar model of enforcement as the Texas law that permits citizen enforcement of that state’s “heartbeat” law banning abortion after roughly six weeks.

filed an Answer. In its answer, the Town elected *not* to respond to legal conclusions asserted in the Complaint.

10. The comment to Super.Ct.Civ.R. 9 states:

[p]leadings which notify the opposing party and the court of the factual and legal basis of the pleader's claims *or defenses better define the issues of fact and law to be adjudicated*. This definition should give the opposing party and the court sufficient information to determine whether the claim of defense is sufficient in law to merit continued litigation.

(Emphasis added).

11. Thus, the Town easily could have lightened the burden faced by the plaintiffs in advancing their claims by admitting the truth of points of law alleged in the Complaint. It chose not to do this, however. The Town's Answer thus failed to admit to points of law that it now argues amounted to "facially apparent constitutional and other legal deficiencies." Obj. at ¶6 (citing Court Order at 4 (June 4, 2021)). The Town could easily have eased the burden on the plaintiffs' by make admissions is not claims were "facially apparent." It did not do so.

13. By declining to acknowledge legal positions asserted in the Complaint, the Town placed the burden on the plaintiffs to prove those parts of their case to this Court. While it was the Town's right to do this, the Court should not give any weight to the Town's claim that is acted in a way to reduce the plaintiffs' litigation burden.

14. Relatedly, the Town argues in ¶5 that:

Importantly, the Plaintiffs did not seek attorney's fees from the Town for the New Hampshire Supreme Court appeal, apparently understanding that the attorney's fee issue was not appropriate as against the Town where the Town was not defending the Ordinance.

This is incorrect.

15. The Supreme Court ruled against NWA and in favor of the plaintiffs on December 23, 2020.

16. Prior to filing the Motion for Attorney's Fees with this Court, undersigned counsel sent defense counsel an attorney's fee demand. That demand included amounts expended litigating against NWA in the New Hampshire Supreme Court.

17. The parties did not reach an agreement on attorney's and the plaintiffs filed a Motion for Attorney's Fees with this Court.

18. Shortly after the Court granted the Motion for Attorney's Fees, undersigned counsel wrote a letter to counsel for the Town once again seeking an agreement on attorney's fees. That letter contained the following:

On February 23, I sent you a demand for payment of fees in the amount of [_____].² Since the date of that letter, I have found judicial precedent holding that the superior court does not jurisdiction to award fees for litigation occurring in the Supreme Court. Thus, the fees that I am able to claim based on superior court litigation amount to [_____].

20. Thus, the reason for the exclusion of fees for time spent defeating NWA in the Supreme Court was **not** that the plaintiffs believed that the Town should not have been responsible for their need to litigate in the Supreme Court. Rather, it was because undersigned counsel had become aware through research on this matter that this Court lacks jurisdiction to provide that relief and that it was likely that too much time had passed to ask the Supreme Court to award fees. See, *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252 (2006); S.Ct.R. 23.

II. The Amount Of Time Expended Litigating This Case Was Not Excessive.

² Although the Rules of Evidence likely do not apply to this attorney's fees litigation, specifics related to attempts to negotiate a dispute are being redacted from this motion to the extent possible to preserve the principles behind N.H.R.Ev. 410.

21. The Town complains that research and writing work that went into drafting the complaint was, “89 paragraphs long and includes citations to several New Hampshire statutes and the New Hampshire and Federal Constitutions.”

22. The amount of work that went into the Complaint was occasioned by the breathtaking scope of the Ordinance adopted by the Town.

23. In order to prevail on this matter, the plaintiffs had to establish that: (1) they had taxpayer standing under Part I, Art. 8 of the New Hampshire Constitution, which was newly adopted in 2018 and remains the source of little precedent to date; (2) the Ordinance was *ultra vires*; (3) the Ordinance was void for vagueness; (4) the field the Ordinance seeks to regulate was pre-empted by state and federal law; and (5) the Ordinance violates the separation of powers and interferes with the Right to Petition contained in the First Amendment.

24. These are disparate, specialized areas of law and, in the case of taxpayer standing under Part I, Art. 8, involves a novel issue not yet defined by judicial opinions. Indeed, at the time the Complaint was filed on March 27, 2019, the taxpayer standing provision of Part I, Art. 8 had been in effect for less than five months since its approval by the voters at the November 6, 2018 elections.

25. The amount of work that went into the Complaint was necessitated by the Town’s adoption of the radical Ordinance that is the subject of this dispute. It is not the plaintiff’s fault that the Ordinance raises so many legal issues. Responsibility for that fact rests solely with the Town and accordingly the Town should pay the plaintiffs’ fees expended defeating the

III. Time Spent Contesting Legal Issues With NWA Does Not Reduce The Town’s Responsibility For Attorney’s Fees.

26. Finally, the Town argues that it should not have to pay attorney’s fees incurred by the plaintiffs addressing issues raised by NWA. This argument should be rejected.

27. The Court's finding that the litigation conferred a substantial public benefit by, "obtaining a declaratory judgment protective of Town businesses and governmental officials at risk of facing extrajudicial demands for thousands of dollars by private parties purportedly not beholden to judicial review." Order at 4.

28. The reason that Town businesses and governmental officials faced this risk is that the Town passed the Ordinance that purported to create those liabilities. NWA may have publicly advocated for the Ordinance, but it was the Town that passed it.

29. Overcoming the defenses advanced by NWA was necessary to obtain the Order removing the risk of enforcement faced by Town businesses and governmental officials.

30. Further, the Town and NWA were hardly strangers in the passage of the Ordinance.

31. As set forth in the Motion for Attorney's Fees, the Town could have made all of this unnecessary at several different stages. The Town could have refused to place the unconstitutional ordinance on the warrant. It did not do so. The Town could have sought a declaratory judgment pursuant to RSA 491:22 prior to putting the measure before the voters. It did not do so. The Town could have allowed its counsel to provide the town meeting with a legal opinion concerning the constitutionality of the Ordinance. Indeed, Brent Tweed himself specifically asked the town official moderating the meeting to have town counsel advise the meeting on this issue. The Town refused to do so. See Motion for Attorney's Fees, ¶¶9-14.

32. The Town's position that it does not bear responsibility for the Ordinance is simply misplaced and should be rejected. The substantial public benefit that the Court found the plaintiffs conferred up on the Town as a whole required a judicial determination that the

Ordinance was unconstitutional and unenforceable. That action was necessary because the Town, not NWA, passed the Ordinance.

33. Finally, payment of the plaintiffs' attorney's fees would not unjustly punish the Town. To the contrary, the Court has already directly addressed this issue in its Order, which reads:

The contention that it would be penalizing or unjust to impose the Petitioner's attorney's fees on the Town is unavailing. Where the unsuccessful party in the underlying action is a government entity, the substantial benefit doctrine is "generally involve[d] only to the extent that "the party bearing the fees is able to spread such costs amongst the person who receive the benefit of the litigation, for example through taxation."

Order at 5 (quoting *Jesurum v. WBTSCC Ltd. P'ship*, 169 N.H. 469, 483 (2016)(emphasis added by Court)).

34. The Town is the proper party to be responsible for fees because it was the Town that forsook the opportunities to avoid the need for litigation, first by failing to block the Ordinance before it was adopted, second, by failing to fully inform the town meeting concerning the potential unconstitutionality of the Ordinance, and third, by filing an answer that did not confess judgment and forced the plaintiffs to litigate the issue to judgment.

35. For the foregoing reasons, all of the arguments raised in the Town's objection should be rejected, and the Court should order the Town to pay the plaintiff's attorney's fees as submitted, augmented by the fees associated with the instant pleading.

Respectfully Submitted
Brent Tweed and G&F Goods, Inc.
By their attorneys,
LEHMANN MAJOR LIST, PLLC

/s/Richard J. Lehmann

September 15, 2021

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CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to opposing counsel via the court's electronic case filing system.

/s/Richard J. Lehmann

Richard J. Lehmann